FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM GASPERINI,
Petitioner,
v.
THE CENTER FOR HUMANITIES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

When a defendant, following a jury verdict in federal district court, moves for a new trial on the grounds that the jury awarded excessive damages, and the district court denies the motion, may a federal court of appeals review that determination and, if so, under what standard of review?

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INTERESTS OF THE AMICI

The amici are trade associations representing the interests of many of the life and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance is the largest life insurance trade association in the United States, representing the interests of more than 580 member life insurance companies. These companies currently underwrite 90.9 percent of the life insurance in force in the United States.

[1] Counsel for both the Petitioner and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

The American Insurance Association represents 280 property and casualty insurers, which employ more than 150,000 people, write $60 billion in premiums annually, and pay nearly $2.2 billion annually in state taxes and licensing fees.

Preserving the power of federal appellate courts to review the denial of new trial motions, where such motions were premised upon the excessiveness of a jury's damages award, is an issue of vital importance to the *amici*'s members. In recent years, the size of such awards (particularly punitive damages awards) has increased sharply, and in some cases, federal district judges have erroneously refused to grant a new trial when the damages were clearly excessive. The *amici* have previously filed a number of briefs in this Court on the issue of excessive punitive damages awards. *See BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting writ of certiorari); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief addresses the third question presented by the petition for certiorari: whether, and under what circumstances, a federal appellate court may reverse a federal district court's decision to deny a new trial where the defendant has claimed that the jury awarded excessive damages. The *amici* contend that a federal appellate court may do so (and order a new trial, with or without a conditional remittitur) when, making all reasonable inferences in favor of the plaintiff, no reasonable jury could have awarded the amount of damages that the jury did.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

1. Because respondent sets the facts forth fully in its brief, the *amici* only summarize the facts here. Respondent The Center For Humanities, Inc. ("the Center") borrowed 300 original slide color transparencies from petitioner William Gasperini ("Gasperini") for use in producing an educational videotape entitled *Conflict in Central America*. Brief for Petitioner ("Pet. Br."), at 2. Gasperini lent the Center these transparencies, which came from his private collection of more than 4700 photographs of Central America, in exchange for royalty payments. Joint Appendix ("J.A."), at 179, 359-361. The Center was to return the transparencies to Gasperini upon completion of the videotape, but was unable to do so because it lost them. Pet. Br. 2.

2. Gasperini filed an action seeking damages for his lost transparencies in the United States District Court for the Southern District of New York ("the district court"). Pet. Br. 1-2. Jurisdiction was predicated on diversity of citizenship. *Id.* The Center admitted that it was liable for losing the transparencies, and the trial was consequently limited to the issue of compensatory damages. J.A. 61.

New York law requires that in assessing damages for lost transparencies, the finder of fact consider the uniqueness of the transparencies and the earning level of the photographer. Appendix to Petition for Certiorari ("Pet.

App."), at 5a. Gasperini did offer evidence that some of his photographs were unique, but did not even attempt to prove that the vast majority of the photographs were unique; indeed, he acknowledged that "[u]sually there were" other photographers present when he was taking pictures. J.A. 197. And, with respect to Gasperini's earnings as a photographer, he testified that his income from marketing his photographs had ranged from a "few hundred" to a "few thousand" dollars a year and that in the ten years preceding the trial, his total earnings from doing so had been approximately $10,000. J.A. 150-151; Pet. Br. 3; Pet. App. 5a. Gasperini was permitted, over the Center's objection, to introduce evidence that the "industry standard" for valuing lost transparencies was $1,500 per transparency. Pet. App. 4a. However, whether an "industry standard" exists is at best a question of fact, to be determined with reference, *inter alia*, to the uniqueness of the transparencies and the earning level of the photographer. *Id.* at 4a-5a. It was the district court's opinion, at the close of all the evidence, that "the evidence in this case is very clear that there is no industry standard." J.A. 280.[2]

Despite the district court's instructions to consider the uniqueness of the photographs and the earning level of the photographer, the jury simply awarded Gasperini $450,000 (representing the "industry standard" of $1,500 per transparency multiplied by 300 slides). J.A. 313.

3. The Center moved for a new trial or remittitur, pursuant to Fed. R. Civ. P. 59, on the grounds that the jury's award was excessive. Pet. App. 11a-12a. The district court denied the motion without comment. *Id.* at 12a.

4. The Center appealed to the United States Court of Appeals for the Second Circuit ("the court of appeals"), which reversed, and ordered that Gasperini either accept

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[2] This comment was made outside the presence of the jury. J.A. 275, 280.

a reduced award of $100,000 or submit to a new trial on damages. Pet. App. 10a. The court of appeals made clear that it was "[d]rawing all reasonable inferences in favor of Gasperini" and "[g]iving Gasperini every benefit of the doubt" (*id.* at 9a), but that, even so, "Gasperini failed to make a showing" with respect to either the uniqueness of the transparencies or his earning level as a photographer that would be "sufficient to sustain the jury's verdict." Pet. App. 5a. In particular, the court of appeals held, among other things, that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original." *Id.*

SUMMARY OF ARGUMENT

I. This Court has long recognized that federal courts (including federal appellate courts) may grant judgment as a matter of law where the evidence introduced at trial would not permit a reasonable jury to find to the contrary. Federal appellate courts have that power because the Seventh Amendment requires only that the jury be allowed to make *reasonable* inferences from the evidence before it. Consequently, when a defendant has moved for a new trial on the grounds that a federal jury awarded excessive damages, and the district court denies the motion, the Seventh Amendment does not prevent federal appellate courts from ordering a new trial (with or without a conditional remittitur) if, making all reasonable inferences in favor of the plaintiff, a reasonable jury could not have awarded the amount of damages that the jury did.

Currently, all of the circuits review a district court's decision to deny a motion for new trial, on the grounds that the jury awarded excessive damages, under an "abuse of discretion" standard. At least three circuits have expressly defined that standard in terms of the "reasonableness" test described above, and there is good reason to

believe that other circuits also define "abuse of discretion" in that way.

Gasperini suggests that if federal appellate courts are allowed to review for "abuse of discretion," they should be permitted to reverse only in cases where there is a complete absence of evidence to support the size of the verdict. However, it is well established, under this Court's prior decisions, that even when a party has introduced some evidence to support its position, that evidence may be legally insufficient to support a verdict in the party's favor. The proper question is not whether there is *any* evidence to support the amount of damages awarded by the jury, but whether there is legally *sufficient* evidence to support the award.

II. There is ample historical support for concluding that the Seventh Amendment does not prevent federal appellate courts from ordering a new trial because of a jury's excessive damages award. At the English common law, prior to 1791, cases were often tried before a single *nisi prius* judge (the analogue of a modern federal district court), and new trials could then be granted by a four-judge trial court sitting at Westminster (the analogue of a modern federal court of appeals). Gasperini and his *amici* attempt to undermine this analogy by contending (1) that it makes no more sense to analogize the four-judge trial court to a modern federal appellate court than it would to argue that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determination and (2) that, in any case, the four-judge trial court would not grant a new trial, for excessive damages, in cases where the *nisi prius* judge felt that a new trial was unwarranted. Both of these contentions lack merit. First, federal district courts *do* cease to act as trial courts when they review cases tried in bankruptcy courts or before federal magistrates. Second, even if it is true that the four-judge trial court could not grant a new trial, for excessive damages, against the wishes of the *nisi prius* judge (which is questionable),

any such restriction can reasonably be explained by the fact that the four-judge panel had to rely upon the *nisi prius* judge for information about what had occurred at trial. Because modern federal appellate courts have access to a complete and independent record of the trial proceedings, they do not need to rely upon the federal district judge in the same way, and to bar them from overruling district judges on this issue would make no sense. The Seventh Amendment preserves only the "fundamental elements" of jury trial—not limitations that stem merely from the "exact procedural incidents or details of jury trial" in 1791.

III. The court of appeals, in this case, reversed the district court's denial of the Center's motion for new trial because it determined that, making all reasonable inferences in favor of Gasperini, a reasonable jury could not have awarded the amount of damages that this jury did. Review under such a standard does not violate the Seventh Amendment.

ARGUMENT

I. THE SEVENTH AMENDMENT DOES NOT PREVENT A FEDERAL APPELLATE COURT FROM REVERSING A FEDERAL DISTRICT COURT'S DECISION TO DENY A NEW TRIAL ON THE GROUNDS OF EXCESSIVE DAMAGES, IF THERE WAS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO AWARD DAMAGES IN THAT AMOUNT

A. When, Making All Reasonable Inferences In Favor Of The Plaintiff, No Reasonable Jury Could Have Awarded The Amount Of Damages That The Jury Did Award, That Award Is Excessive As A Matter Of Law, And It Does Not Violate The Seventh Amendment For A Court Of Appeals To Order A New Trial

The Re-Examination Clause of the Seventh Amendment, which states that "no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law," clearly prohibits a federal court of appeals from overturning a jury's resolution of disputed facts. However, it does not prohibit the court from examining the evidence to determine whether a rational trier of fact could have reached the verdict arrived at by the jury. Consequently, where a federal district court has denied a motion for new trial on grounds of excessive damages, the Seventh Amendment does not prohibit the court of appeals from determining whether the amount of damages awarded exceeds that which a rational trier of fact could have awarded and whether, as a result, the district court has abused its discretion by refusing to order a new trial.[3]

It is well established, under this Court's precedents, that the Seventh Amendment permits federal courts (including appellate courts) to "direct a verdict for insufficiency of evidence." *Galloway v. United States*, 319 U.S. 372, 389 (1943) (stating that the Court had repeatedly so held "for nearly a century"); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967) ("As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does"). The reason that the court of appeals has this power is that the jury's discretion, as the finder of fact, is not untrammeled. It must be exercised reasonably. As the Court held in *Galloway*, the Seventh Amendment requires only "that the jury be allowed to make *reasonable* inferences from facts proven

[3] As Gasperini acknowledges, federal district courts have broad discretion to grant a new trial, and may do so even where the evidence was legally sufficient to justify the jury's verdict, on the grounds that the verdict was against the weight of the evidence. Pet. Br. 38. The *amici* do not claim a similar breadth of discretion for federal appellate courts—only the power, as defined above, to act in those cases where the district court has abused its discretion.

in evidence having a *reasonable* tendency to sustain them." 319 U.S. at 396 (emphasis added).

Consequently, where a federal district court has denied a motion for new trial, made on the grounds that the jury awarded excessive damages, there is nothing in the Seventh Amendment to prevent the court of appeals from determining whether the jury acted rationally in awarding the amount of damages that it did.[4] In doing so, the court of appeals may appropriately apply the same standard of review that it would use in reviewing the denial of a motion for judgment as a matter of law: i.e., whether, making all *reasonable* inferences in favor of the plaintiff, *reasonable* persons could not, in light of the evidence, have arrived at the verdict that the jury did. *E.g.*, *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1513 (Fed. Cir. 1984), *cert. denied*, 496 U.S. 871 (1984).[5] If the verdict exceeds what a rational trier of fact could have awarded, then the district court has clearly abused its discretion in failing to order a new trial, and the court of appeals should be permitted to

[4] This Court held, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989), that it is not the role of the Court (or, presumably, other federal appellate courts) "to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioner's motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur." However, as a practical matter—and particularly in cases such as the present one, where the district court denied the defendant's motion for new trial without comment (*see* Pet. App. 12a)—the only way to determine whether the district court abused its discretion is to determine whether, upon the evidence presented at trial, the jury's award was rational.

[5] Comparing the jury's award with awards made in other cases or legislative penalties for similar misconduct can provide useful guidance in this regard, although such data is of course not dispositive.

require such a trial (with or without a conditional remittitur).[6]

Gasperini argues that if a defendant believes there is insufficient evidence to justify a rational trier of fact in awarding damages above some particular amount, the defendant should simply move for judgment as a matter of law, before the case goes to the jury, asking that the jury be limited to awarding no more than that amount of damages. Pet. Br. 39-40. However, under the procedure suggested by Gasperini, the court of appeals would often be powerless to disturb jury awards that it deemed to be excessive as a matter of law. For example, if the defendant had moved for judgment as a matter of law on damages, arguing that damages could not rationally exceed $1 million (a motion that the district court denied), and the court of appeals felt that the jury could rationally have awarded as much as (but no more than) $1.25 million, the court of appeals would be powerless to disturb an award of $20 million, despite its conclusion that the award was excessive as a matter of law. Nor does the fact that the defendant and the court of appeals might disagree about the precise limits of what is reasonable mean that all awards, in any amount whatsoever, are therefore reasonable as a matter of law. Indeed, with respect to punitive damages awards, this Court has held both (1) "that the Constitution imposes a substantive limit on the size of punitive damage awards" (a limit that even Gasperini's *amici* acknowledge is "arguably legal" in nature[7]) and (2) that it can nonetheless be difficult to "'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.'" *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

[6] Offering the option of a remittitur, as the Second Circuit did in this case, merely increases the plaintiff's range of choices, without depriving him or her of the right to a new trial.

[7] Brief of Federal Jurisdiction and Legal History Scholars ("Scholars' Br."), at 20.

B. At Least Some Federal Courts Of Appeals Do Employ This Standard Of Review When Reviewing A District Court's Decision To Deny A Motion For New Trial On The Grounds That Damages Were Excessive

All of the circuits have, for many years, exercised the power to review a district court's denial of a motion for new trial, where the grounds for such motion were that the damages awarded by a jury were either excessive or inadequate. 11 Charles A. Wright *et al., Federal Practice and Procedure* § 2820, at 209 (2d ed. 1995); 6A James W. Moore *et al., Moore's Federal Practice* ¶ 59.08[6], at 59-175 (2d ed. 1995). Most of those courts, in doing so, state that they are reviewing the district court's decision for "abuse of discretion." Wright, *supra*, § 2820 at 212-213; Moore, *supra*, ¶ 59.08[6], at 59-177. Although the courts of appeals are not always specific about the precise methods that they are using in determining whether the district court "abused its discretion," it appears that at least some circuits do employ the standard of review urged by the *amici*: namely, whether, making all reasonable inferences in favor of the plaintiff, reasonable persons could not, in light of the evidence, have arrived at the verdict that the jury did.

The First, Fifth, and Seventh Circuits have expressly acknowledged their use of such a standard. *See, e.g., Anthony v. G.M.D. Airline Services, Inc.*, 17 F.3d 490, 493 (1st Cir. 1994) (in determining whether the trial court abused its discretion by refusing to set aside a verdict as excessive, the court will view the evidence on damages "in the light most favorable to the plaintiff" and find an abuse of discretion "only if the jury's verdict exceeds 'any rational appraisal or estimate of the damages

that could be based on the evidence before the jury' ") (citations omitted); *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 178 (5th Cir. 1992) ("the district court abused its discretion when it denied [defendant's] motion for remittitur because the damages were excessive as a matter of law. A verdict is excessive as a matter of law if shown to exceed 'any rational appraisal or estimate of the damages that could be based upon the evidence before the jury' ") (citations omitted); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 516 (7th Cir. 1993) (in determining whether the district court abused its discretion in refusing to grant a new trial, on the grounds that damages were excessive, the court of appeals "review[s] the damages evidence in the light most favorable to the jury's verdict, and the verdict must stand unless there is no rational connection between the evidence and the jury's award") (citations omitted).

Moreover, other federal courts of appeals may well have such a standard in mind when they hold that they will reverse the denial of a motion for new trial only in cases where the damages awarded by the jury "shock the conscience" of the court or are "grossly excessive." Gasperini argues that such phrases imply "an improper subjective reevaluation of the facts." Pet. Br. 47. But, as this Court recognized in *Oberg*, "there may not be much practical difference between review which focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia* . . . [i.e.,] *whether 'no rational trier of fact could have' reached the same verdict*[]." 114 S. Ct. at 2341 n.10 (emphasis added). That is a legal question, not a factual one, and the Seventh Amendment does not prevent federal appellate courts from deciding it.

C. Gasperini's Suggested Standard Of Review Is Improper

Gasperini argues that if the Court allows federal courts of appeals to order new trials when damages are excessive, they should be permitted to do so only when "there is a complete absence of evidence to support the size of the verdict." Pet. Br. 49. However, the standard urged by Gasperini is far too restrictive.

It is well established, under this Court's decisions, that even when a party has introduced *some* evidence to support its position, that evidence may be legally insufficient to support a verdict in the party's favor. *See, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986) (on motions for directed verdict, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to make out an issue for the jury; instead, the court should grant judgment as a matter of law to the defendant unless there is "evidence on which the jury could reasonably find for the plaintiff"). *See also Galloway*, 319 U.S. at 395 (when determining whether evidence is legally sufficient to support a jury verdict in a party's favor, the issue is not whether there is "any" evidence, "some" evidence, or "substantial" evidence; rather, "[w]hatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked"). Consequently, when a federal appellate court decides whether a jury could rationally have awarded the amount of damages that it did, the proper inquiry is not whether there was *any* evidence to support the size of the verdict, but rather whether there was *sufficient* evidence to provide rational justification for the size of the verdict.

II. ENGLISH COMMON LAW PRACTICE, AT THE TIME OF THE SEVENTH AMENDMENT'S ADOPTION IN 1791, IS FULLY CONSISTENT WITH THE EXERCISE OF SUCH POWER BY FEDERAL APPELLATE COURTS

Gasperini and his *amici* concede that, under English common law practice prior to 1791, cases were often tried before a single trial judge (the *nisi prius* judge) in the county where the jurors, parties, and witnesses were located, and that the common law trial courts sitting at Westminster, in panels of four judges each, had the power to grant a new trial in such cases on the grounds, among others, that the jury had awarded excessive damages. Pet. Br. 28-30; Brief of Federal Jurisdiction and Legal History Scholars ("Scholars' Br."), at 12-14.[8] Clearly, as Gasperini recognizes, one can analogize the four-judge panel to a modern federal court of appeals and the *nisi prius* judge to a modern federal district court. Pet. Br. 28-29. That means, then, that there is precedent, at English common law, for allowing a federal court of appeals (the analogue of the four-judge trial court at Westminster) to order a new trial on grounds of excessive damages.

However, Gasperini argues against reaching such a conclusion, for two reasons: (1) that "[i]t makes no more sense to analogize the English common law trial court to today's federal appellate court, than to contend that a federal district court ceases to act as a trial court when it reviews a magistrate's or bankruptcy judge's determination" (Pet. Br. 30) and (2) that, after the jury had rendered its verdict in a case tried before a *nisi prius* judge, the four-judge panel would grant a new trial, on grounds of excessive damages, only in cases where the

[8] Indeed, only the four-judge panel had the power to grant a new trial; the *nisi prius* judge did not. *See, e.g.*, William Riddell, *New Trial at the Common Law*, 26 Yale L.J. 49, 53 (1916) ("If the trial was considered unsatisfactory, an application could not be made to the Nisi Prius judge but must be made to the court").

nisi prius judge agreed that a new trial was warranted. *Id.* at 32. However, both of these objections lack merit.

First, federal district courts *do* cease to act as trial courts when they review cases tried in bankruptcy courts and before federal magistrates. Thus, in *Smith v. Strickland*, 178 B.R. 524, 525 (M.D. Fla. 1995), the district court held that "[t]his Court functions *as an appellate court* in reviewing the bankruptcy court's decision . . . ." (Emphasis added). *See also In re Charfoos*, 979 F.2d 390, 392 (6th Cir. 1992) (on appeal from the decision of a bankruptcy court, both the district court and the court of appeals apply the same deferential standard of review); *In re Antweil*, 931 F.2d 689, 691 (10th Cir. 1991) (same), *aff'd sub. nom. Barnhill v. Johnson*, 503 U.S. 393 (1992); *In re United States Trustee*, 32 F.3d 1370, 1372 (9th Cir. 1994) (same). Similarly, when litigants have consented to try their case before a United States magistrate and have elected to appeal that decision to the federal district court, pursuant to 28 U.S.C. §§ 636 (c)(1) and 636(c)(4) (1994), the federal district court "sit[s] as a court of appeals" and "must apply the same rules as a court of appeals." *Jones v. Judy*, 741 F. Supp. 1293, 1294 (N.D. Ohio 1990). Consequently, the district court must apply the same deferential standard of review that a court of appeals does. *Florists Mut. Ins. Co. v. Tatterson*, 802 F. Supp. 1426, 1431 (E.D. Va. 1992) ("[i]n reviewing a decision of a Magistrate Judge, a district court should utilize the same standard of review utilized by the court of appeals in reviewing a decision of the district court"); *Ben v. Burgess*, No. 93 C 4683, 1996 WL 73598, at *2 (N.D. Ill. Feb. 16, 1996) (same); *Forbes v. Weeks Dredging & Contracting, Inc.*, No. CV-93-0111, 1995 WL 669678, at *2 (E.D. N.Y. Nov. 5, 1995) (same).[9]

[9] It is true that when a district judge designates a magistrate to conduct hearings—including evidentiary hearings—on certain kinds of motions, applications, and petitions, the magistrate sub-

Second, even assuming that the four-judge trial court panel at Westminster could not grant a new trial, for excessive damages, against the wishes of the *nisi prius* judge (which is questionable [10]), any such restriction can reasonably be explained by reference to the panel's limited information about the proceedings before the *nisi prius* judge—a procedural difficulty that has been eliminated in modern American practice. Because the Seventh Amendment was intended to preserve only the most fundamental elements of trial by jury, and not those which are attributable to the details of ancient procedure (*Galloway*, 319 U.S. at 390, 392), the Seventh Amendment does not prohibit modern federal appellate courts from granting new trials, for excessive damages, in cases where a federal district court has refused to do so.

As Gasperini and his *amici* acknowledge, the four-judge panel at Westminster had no independent record

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mits findings of fact and recommendations for the disposition of the motion being heard, and the district judge may review *de novo* any portion of that report to which the parties object. 28 U.S.C. § 636(b)(1). However, we are concerned here with matters *tried* to the magistrate (i.e., committed to the magistrate for the handling of all proceedings and the entry of judgment)—the procedure for which is governed by 28 U.S.C. § 636(c), as discussed above.

[10] It appears that excessiveness of damages and verdicts contrary to the weight of the evidence were regarded as two distinct grounds for granting a new trial, and that only the latter required the assent of the *nisi prius* judge. *See* 3 William Blackstone, *Commentaries on the Laws of England* 387 (1768) (listing as separate grounds for granting a new trial [1] "any gross misbehaviour of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith" and [2] that "they [the jury] have given exorbitant damages"); William Forsyth, *History of Trial By Jury* 156-158 (1875) (listing thirteen grounds for granting a new trial, the eleventh being that the verdict was without or contrary to evidence [new trials not usually being granted, where there was conflicting evidence, unless the judge declared himself dissatisfied with the verdict] and the thirteenth being that damages were excessive).

of the evidence presented at trial and had to rely upon the report of the *nisi prius* judge, who had presided at the trial, for that information. *See* Pet. Br. 34 n.32 ("[i]t bears emphasis that the 'record' did *not* include the evidence presented at trial . . . so without the *nisi prius* judge's report, there was no way for the trial court to evaluate whether the verdict was supported by the evidence") (emphasis in original and citation omitted); Scholars' Br. 13 ("The procedure [of moving for a new trial] was informal, being based on the trial judge's information as supplied to his colleagues"). Under those circumstances, it might well have been prudent for the four-judge panel to order a new trial only in cases where the *nisi prius* judge agreed. But modern American appellate courts (the analogue of the four-judge panel at Westminster) have access to a complete and independent record of the evidence given at trial and no longer must rely upon the district judge (the analogue of the *nisi prius* judge) for an account of the trial proceedings. Consequently, in light of modern procedures, it would make little sense to prevent a court of appeals from ordering a new trial just because the district court refused to do so.

This Court held, in *Galloway*, that:

> The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing.
>
> * * * *
>
> [T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details . . . .

319 U.S. at 390, 392 (footnotes omitted). To hold that courts of appeals may not grant a new trial, on grounds of excessive damages, just because the district court failed

to do so, would pay undue homage to the "mass of procedural forms and details" that existed in 1791. The "fundamental elements" of jury trial, as it existed at the common law, are not compromised by permitting appellate courts to grant new trials on the grounds of excessive damages.

III. IN THIS CASE, THE COURT OF APPEALS FOUND THAT THERE WAS NO LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR A REASONABLE JURY TO AWARD DAMAGES IN THE AMOUNT THAT THE JURY DID, AND THEREFORE THE COURT DID NOT VIOLATE THE SEVENTH AMENDMENT BY REVERSING THE DISTRICT COURT'S DECISION TO DENY A NEW TRIAL

Although the court of appeals in this case did not articulate its standard of review as clearly as it might have, it is sufficiently clear, from the language used in the opinion, that the court reviewed the district court's denial of the Center's motion for new trial under the appropriate standard: namely, whether, making all reasonable inferences in favor of Gasperini, reasonable persons could not, in light of the evidence, have awarded the amount of damages that the jury did. Consequently, the court of appeals' decision to offer Gasperini a choice between remittitur or a new trial did not violate the Seventh Amendment.

The court of appeals held that "it is not our job to impose a specific award of damages—that task is for the jury. We do, however, have the obligation to patrol the outer bounds of what damages a jury may *reasonably* award, and to offer a choice between remittitur and new trial when those bounds have been exceeded." Pet. App. 9a (emphasis added and citations omitted). Accordingly, the court made clear that it was "[d]rawing all reasonable inferences in favor of Gasperini" and "[g]iving Gasperini every benefit of the doubt" (*id.*), but that, even so, "Gasperini failed to make a showing" that, under New York damages law, would be "sufficient to sustain the jury's verdict." Pet. App. 5a. The court of appeals also held that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original." *Id.* These statements indicate that the court of appeals confined itself to determining whether a rational trier of fact could have made the award that the jury did.

Gasperini suggests that because the court of appeals announced that it was applying New York's "reasonable compensation" standard (i.e., "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation"), and because New York's intermediate appellate courts may make *de novo* findings of fact in applying that substantive standard, the court of appeals assumed that it, too, could undertake *de novo* review of the jury's award. Pet. Br. 8. However, as demonstrated above, the court of appeals did not undertake the kind of *de novo* review that New York intermediate appellate courts perform and thus implicitly declined to follow New York's procedure for appellate review of damages awards. Rather, it used a standard of review that fully complies with any limitations imposed by the Seventh Amendment: namely, whether, making all reasonable inferences in favor of the plaintiff, reasonable persons could not, in light of the evidence, have arrived at the verdict that the jury did.[11]

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[11] The court of appeals stated that the standard of review that it employed "accords less deference to the jury's award" than does the "traditional" shock-the-conscience standard. Pet. App. 8a. For the reasons discussed in Part I.B of the Argument above, the *amici* doubt whether that is correct; the two standards are in all likelihood identical. But even if the court of appeals was correct, and the shock-the-conscience standard is more deferential to the jury's verdict than the standard that the court of appeals actually employed, the fact that the latter standard complies with the

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Seventh Amendment means that the shock-the-conscience standard, being even *more* deferential to the jury, certainly must comply with the Seventh Amendment.